Le Hazen Resources Sdn Bhd v Land Administrator of Federal Territory Kuala Lumpur

HIGH COURT (KUALA LUMPUR) — LAND REFERENCE NO S-15–36 OF 2010
ASMABI MOHAMAD JC, NORDIN DAHAROM GOVERNMENT VALUER AND RAJA ABDUL AZIZ PRIVATE VALUER
20 DECEMBER 2011

Evidence — Adverse inference — Invocation, of — Land acquisition — Landowner claiming that total area of land acquired was understated — Burden on landowner to prove land size — Failure of landowner to produce sale and purchase agreement to prove land size — Whether adverse inference could be invoked against landowner — Evidence Act 1950 s 114(g)

Land Law — Acquisition of land — Compensation — Assessment of — Whether compensation awarded for total area of land acquired — Whether land should have been valued as town land due its location — Whether all relevant factors taken into consideration by government in assessing fair and reasonable compensation — Land Acquisition Act 1960 s 37(1)

This was a land reference pursuant to s 37(1) of the Land Acquisition Act 1960 ('the Act') that arose from an objection filed by the landowner against the award of the respondent in respect of the compulsory acquisition of a piece of land known as Lot No 5368 ('the said land'). The panel that heard the land reference had decided to maintain the award of compensation by the respondent. The applicant being dissatisfied with the said decision lodged this appeal. The applicant contended that the total area of the said land that was acquired was 6.627 hectares but the applicant was only awarded compensation in respect of 5.9037 hectares. In determining the adequate compensation to be awarded to the applicant the government valuer had not valued the land as agricultural land but had instead taken into consideration the planning information she had obtained from the Department of Town Planning of the Kuala Lumpur City Hall which stated that the said land was subject to residential zone with the density of 60 person per acre. The applicant claimed that since the said land was located in the town of Kuala Lumpur the said land was therefore town land and should be subject to implied condition that it shall be used for building.

Held, allowing the application:

(1) It was the applicant's contention that the area that was acquired was 6.627 hectares and not 5.9037 hectares as stated in the s 8 of the *gazette*

notification. Pursuant to s 106 of the Evidence Act 1950 ('EA') the burden was on the applicant to prove this fact existed on the balance of probabilities. The most practical and simplest thing the applicant could have done was to exhibit the sale and purchase agreement entered into between the purchaser and the vendor of the said land to prove the actual area. Failing which an adverse inference could be invoked against the applicant pursuant to s 114(g) of the EA. The applicant too had not offered a reasonable explanation as to why the crucial document such as the sale and purchase document which was in the possession of the applicant was not produced in court to support its claim. The applicant had also not raised objection pertaining to the size of the land before the respondent during the inquiry. Hence, the court was satisfied that the area that was acquired for the purposes of the acquisition was 59,037 sq meters as stated in the *gazette* made pursuant to s 8 (see paras 20–21).

(2) In view of s 51 and s 53(2) of the National Land Code, the applicant's argument that the said land was a town land due its location in Kuala Lumpur had no merits and ought to be rejected by this court; *Garden City Development Bhd v Collector of Land Revenue, Federal Territory* [1982] 2 MLJ 98 distinguished (see paras 28–29).

(3) In assessing a fair and reasonable compensation to be awarded to the applicant the government valuer had taken all relevant factors into consideration and had not erred in law or facts as alleged by the applicant. The award of compensation of RM660 per sq meters in respect of 59,037 sq meters by the respondent that was confirmed by the panel was reasonable and within the principle and framework of the law (see paras 30–31).

[Bahasa Malaysia summary

Ini adalah rujukan tanah berikutan s 37(1) Akta Pengambilan Tanah 1960 ('Akta') yang berbangkit daripada bantahan yang difailkan oleh tuan punya tanah terhadap award responden berkaitan pengambilan dengan paksa sebidang tanah dikenali sebagai Lot No 5368 ('tanah tersebut'). Panel yang mendengar rujukan tanah tersebut telah memutuskan untuk mengekalkan award pampasan oleh responden. Pemohon tidak puas hati dengan keputusan tersebut memfailkan rayuan ini. Pemohon berhujah bahawa kawasan keseluruhan tanah yang diambil adalah 6.627 hektar tetapi pemohon hanya diawardkan pampasan berkaitan dengan 5.9037 hektar. Dalam menentukan pampasan yang wajar untuk diawardkan kepada pemohon, penilai kerajaan tidak menilaikan tanah tersebut sebagai tanah pertanian tetapi sebaliknya mengambil kira maklumat perancangan yang diperolehinya daripada Jabatan Perancangan Dewan Bandaraya Kuala Lumpur yang menyatakan bahawa tanah tersebut adalah tertakluk kepada zon kediaman dengan kepadatan 60 orang seekar. Pemohon menuntut bahawa memandangkan tanah tersebut terletak di bandar Kuala Lumpur tanah tersebut oleh itu adalah tanah bandar

dan patut tertakluk kepada syarat tersirat yang ia akan digunakan untuk bangunan.

Diputuskan, membenarkan permohonan:

(1) Adalah hujahan pemohon bahawa kawasan yang diambil alih adalah 6.627 hektar dan bukan 5.9037 hektar seperti yang dinyatakan dalam s 8 pemberitahuan *warta*. Berikutan s 106 Akta Keterangan 1950 ('AK') beban adalah ke atas pemohon untuk membuktikan fakta ini wujud atas imbangan kebarangkalian. Paling praktikal dan perkara yang paling mudah pemohon patut boleh buat adalah untuk mempamerkan perjanjian jual dan beli yang dimasuki di antara pembeli dan penjual tanah tersebut untuk membuktikan kawsaan sebenar. Kegagalan untuk berbuat begini membolehkan inferens bertentangan dibangkitkan terhadap pemohon berikutan s 114(g) AK. Pemohon juga tidak menawarkan penjelasan yang munasabah terhadap mengapa dokumen yang penting seperti dokumen jual dan beli yang mana berada dalam tangan pemohon tidak dikemukakan di mahkamah untuk menyokong tuntutannya. Pemohon juga tidak membangkitkan bantahan berkaitan saiz tanah tersebut di hadapan responden semasa siasatan tersebut. Maka, mahkamah berpuas hati bahawa kawasan yang diambil alih untuk tujuan pengambilan tanah adalah 59,037 meter persegi seperti yang dinyatakan di dalam *warta* yang dibuat berikutan s 8 (lihat perenggan 20–21).

(2) Berdasarkan s 51 dan s 53(2) Kanun Tanah Negara, hujahan pemohon bahawa tanah tersebut adalah tanah bandar kerana lokasinya di Kuala Lumpur tidak mempunyai merit dan patut ditolak oleh mahkamah ini: *Garden City Development Bhd v Collector of Land Revenue, Federal Territory* [1982] 2 MLJ 98 dibezakan (lihat perenggan 28–29).

(3) Dalam menilai pampasan adil dan munasabah untuk diawardkan kepada pemohon penilai kerajaan telah mengambil kira kesemua faktor relevan dalam pertimbangan dan tidak silap dari segi undang-undang atau fakta seperti yang didakwa oleh pemohon. Award pampasan RM660 setiap meter persegi berkaitan 59,037 meter persegi oleh responden yang telah disahkan oleh panel adalah munasabah dan dalam prinsip dan rangka kerja undang-undang (lihat perenggan 30–31).]

Notes

For cases on compensation, see 8(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2125–2169.

Cases referred to

Garden City Development Bhd v Collector of Land Revenue, Federal Territory [1982] 2 MLJ 98; [1982] CLJ (Rep) 20, PC (distd)

Legislation referred to

Evidence Act 1950 ss 106, 114(g)
Land Acquisition Act 1960 ss 8, 37(1), 40A, 40D, 40D(3), 49, 49(1)
National Land Code ss 51, 51(2), 53, 53(1), (2), Form N

(Sheng Lee) for the applicant.
(Senior Federal Counsel, Attorney General's Chambers) for the respondent.

Asmabi Mohamad JC:

INTRODUCTION

[1] This is a land reference pursuant to s 37(1) of the Land Acquisition Act 1960 (the 'Act') that arose from an objection filed by the landowner against the award of the respondent in respect of the compulsory acquisition of a total area of 59037 sq meter of Lot No 5368 ('Lot Baru 38568') held under Geran 256 Mukim Petaling, Daerah Kuala Lumpur, Federal Territory of Kuala Lumpur for the purposes of 'Projek Laluan Sambungan Sistem Transit Aliran Ringan (LRT) Laluan Ampang Dari Sri Petaling Ke Putra Height' ('the land').

THE DOCUMENTS

[2] For the purpose of this Land reference the following documents are relevant and were referred to:

(a) the land reference — encl 1;

(b) private valuer's reports — Document 'A';

(c) private valuer's rebuttal — Document 'B';

(d) common plan — Document 'C';

(e) affidavit of Yeo Seow Chung — Document 'D';

(f) government valuer's report — Document 'E'; and

(g) government valuer's rebuttal — Document 'F'.

THE OBJECTION

[3] In its Form N filed herein (pp 114–116 of encl 1) the applicant had stated four grounds of objection as follows:

(a) Size of the land

The size of the land that was acquired was 66,270 sq meters and not 59,037sq meters. Therefore the applicant ought to have been compensated for the land area of 66,270sq meters and not 59,037sq meters.

(b) Amount of compensation

(i) The award by the respondent did not reflect the market value of the land that was acquired;

(ii) the respondent did not consider all relevant factors in making the award;

(iii) the respondent did not consider that the registered owner had lost all its investment and costs expanded towards the development of the said land; and

(iv) the applicant reserved all rights to raise further objection upon receipt of the valuation report from the respondent.

(c) Payment of compensation to Wong Wee Chong @ Wong Weng Cheong
The applicant objected to the award of compensation by the respondent to one Wong Wee Chong @ Wong Weng Cheong as there was an agreement between the applicant and the said Wong Wee Chong @ Wong Weng Cheong for the compensation to be paid between them and that the said Wong Wee Chong @ Wong Weng Cheong had agreed to assign all his rights pertaining to the said land to the applicant; and

(d) Compensation wrongly paid to the chargee
The applicant objected to the award of compensation made by the respondent to the chargee, AmBank (M) Bhd as the chargee's rights over the said land is limited to the amount owed only which is less than RM20,000,000.

PARTICULARS PERTAINING TO THE LAND

[4] For ease of reference the relevant particulars (the more relevant particulars in bold) of the said land as found in the document of title (Annexure 'B' of Document 'E') are reproduced below as follows:

No. Hak milik: 256

Negeri: Wilayah Persekutuan KL

Daerah: Kuala Lumpur

No. Lot: Lot 5368 (Lot Baru 38568)

Bandar/Pekan/Mukim: Mukim Petaling

Luas Tanah: 6.627 hektar

Kategori Kegunaan Tanah: Tidak dinyatakan

No Lebaran Piawai: 93-D

No. Pelan diperakui: 22736

Tarikh pemberimilikan: 12 Oktober1959

Hak milik asal: GRT 5618 Mukim Petaling

Hak milik yang terdahulu: CT 18091 Mukim Petaling

BRIEF BACKGROUND

[5] The panel that heard this land reference on 8 August 2011 had arrived at a decision ('the said decision') and made an order ('the said order') to maintain the award of compensation by the respondent which was at RM660 per sq meter for the total area of 59037sq meters. The court had made a further order for the deposit of RM3,000 to be forfeited and for each assessor to be paid RM500 by the applicant. No order was made in respect of costs.

[6] The applicant being dissatisfied with the said decision of the panel had lodged an appeal against the said order of this court dated 22 August 2011.

[7] Section 40D(3) of the Act stipulates that a decision in respect of the determination of compensation of this court is final leaving no room for an aggrieved party to appeal against the said decision.

[8] Section 40D(3) of the Act (decision of the court on compensation) reads as follows:

> (3) Any decision made under this section is final and there shall be no further appeal to a higher Court on the matter.

[9] Reiterating this position in law that a decision of the court on compensation is final and there is no appeal from a decision of the court on an award of compensation, s 49(1) of the Act further provides:

> Any person interested, including the land administrator and any person or corporation on whose behalf the proceedings were instituted pursuant to s 3 may appeal from a decision of the court to the Court of Appeal and to the Federal Court:
>
> Provided that where the decision comprises an award of compensation there shall be no appeal there from.

[10] From the reading of ss 40D and 49 of the Act as quoted above, it is

crystal clear that the Act does not provide an avenue for appeal against the said decision of the court in respect of the amount of compensation. In view of the above this grounds of judgment will not focus on the issue of the adequacy of the compensation awarded.

[11] At the outset of the hearing of this land reference learned counsel for the applicant and the senior federal counsel of counsel for the respondent had sought leave to address this court on two legal issues which according to both counsel would ultimately have the effect on the determination of the fair and reasonable compensation to be awarded. These issues are firstly pertaining to the actual size of the land belonging to the applicant that was acquired and secondly the category of land use in respect of the said land. Notwithstanding the fact that there were four objections that were raised in Form N filed herein both parties agreed to confine their submissions only to the above two issues.

[12] I made a ruling for this court to proceed with the hearing of this land reference in the usual manner and directed the respective learned counsel to address the legal issues at the end of the hearing.

[13] In deciding the issues posed for this court's consideration I am also guided by the provisions of s 40A of the Land Acquisition Act 1960 (Act 486) in that these being legal issues, were to be decided by the court consisting of a judge sitting alone. On 22 August 2011 I announced my decision on these two issues in open court. My decision on these two issues had formed the basis for the learned assessors' opinion in determining a fair and reasonable compensation to be awarded to the applicant. The unanimous decision in respect of the compensation was made by the panel on 22 August 2011 after my ruling on these two legal issues were made.

ISSUES FOR DETERMINATION

First issue: What was the size of the land that was acquired?

[14] The applicant contended that the total area of the applicant's land that was acquired for the purposes of 'Projek Laluan Sambungan Sistem Transit Aliran Ringan (LRT) Laluan Ampang Dari Sri Petaling Ke Putra Height' was 6.627 hectares. However the applicant was only awarded compensation in respect of 5.9037 hectares (59037sq meters). The applicant contended that it ought to have been compensated for the whole area of 6.627 hectares and not 5.9037 hectares (59037sq meters) as that was done in this case.

[15] In support of the applicant's contention that the land that was acquired was 6.627 hectares and not 5.9037 hectares an affidavit affirmed by a licensed surveyor, one Yeo Seow Chung was filed herein (Document 'D') exhibiting the

1959 approved survey plan of the said land issued by the Survey Department of the Federal Territory (exh 'YSC3'). The total area of the said land as shown in exh 'YSC3' is 18.162 acres which is equivalent to 7.35 hectares. The applicant argued that if one were to do an arithmetical calculation, that is, by deducting the area of the land that was acquired in 1994 from the original size of the land of 18.162 acres (7.35 hectares) the remaining figure would tally with the area of the land as stated in Annexure 'B' of Document 'E'. In view of this the total area of the applicant's land that was acquired was in fact 6.6267 hectares as reflected in Annexure 'B' of Document 'E'.

[16] The government valuer had testified that the whole of the area of the land that was acquired was 59037sq meters (5.9037 hectares) and not 6.627 hectares as claimed by the applicant. She had further testified that the title in respect of the said land had not taken into consideration land measuring 0.7233 hectares that was acquired in 1994 for the purposes of the KESAS Highway. If the said acquisition had been taken into consideration the actual area of the land is 59037sq meters as stated in the Federal Government's *Gazette* made pursuant to s 8 of the Land Acquisition Act 1960 (Act 486) dated 13 August 2009. The government valuer had valued the land based on 59037sq meters. Even the private valuer who was engaged by the applicant had valued the land based on 59037sq meters.

[17] The fact that an area of 0.7233 hectare was acquired was not disputed by both parties. The government valuer had stated that a file had been opened in respect of the 1994 acquisition which was PTG/WP9/3/90/JLD 11 SJ8. A close examination of the title as in Annexure 'B' of Document 'E' would show that there were entries in respect of Presentation No 3732/1994 which confirmed that a total area of 0.7233 hectares had been acquired in 1994.

[18] The learned senior federal counsel submitted that the court could not rely on the survey done in 1959 as the said survey did not show all the transactions that were done between 1959 until the year 2010. In short appendix 'B' to document 'A' did not disclose all transactions relating to the said land. This court was urged to look at annexure 'B' of document 'E' as annexure 'B' reflected the current status of the said land. Further the issue of what was the actual area that was acquired was never raised during the inquiry before the respondent but was only raised during the hearing before this panel.

[19] At the same time this court was urged to examine the applicant's own document, Appendix I of document 'A', the development proposal which clearly showed that a total of 1,778 acres consisted of land which was already acquired by the relevant authorities (see area shaded in green and the description). Even the applicant's own document clearly acknowledged that an area of 0.7233 hectares was subject to a prior acquisition exercise.

[20] It is the applicant's contention that the area that was acquired was 6.627 hectares and not 5.9037 hectares (59037 sq meters) as stated in s 8 *gazette* notification. Pursuant to s 106 of the Evidence Act 1950 the burden in on the applicant to prove this fact existed on the balance of probabilities. The most practical and simplest thing the applicant could have done was to exhibit the sale and purchase agreement entered into between the purchaser and the vendor of the said Land to prove to this court the actual area that was purchased in the year 2004 and 2005 respectively. Failing which an adverse inference can be invoked against the applicant pursuant to s 114(g) of the Evidence Act 1950. The applicant too had not offered a reasonable explanation as to why the crucial document such as the sale and purchase document which is in the possession of the applicant was not produced in court to support its claim. The applicant instead chose to rely on the 1959 survey plan that the applicant had obtained through its licensed surveyor which did not contain all relevant particulars to assist the court in determining the actual land area that was affected by the said acquisition. The applicant had also not raised objection pertaining to the size of the land before the respondent during the inquiry.

[21] Based on the oral and documentary evidence adduced during the hearing I am satisfied that the area that was acquired for the purposes of this acquisition was 59037sq meters as stated in the *gazette* made pursuant to s 8 of the Act 486.

Second issue: Whether the said land is subject to an implied condition that it shall be used for building or agricultural purposes

[22] As can be seen in para 4 above the category of land use for the said land is not stated in the land title.

[23] Reference will have to be made to the provisions of s 51 of the National Land Code (Act 56) which provides as follows:

> Classification of land
>
> 51
>
> (1) For the purposes of this Act, land shall be classified as follows:
>
> (a) land above shoreline; and
>
> (b) foreshore and sea-bed.
>
> (2) Land above the shoreline shall be classified as follows:
>
> (a) town land that is to say, land in any area of the State declared in accordance with the provisions of section 11 to be a town or, by virtue of section 422, deemed to be a town duly constituted as such under those provisions;

(b) Village land, that is to say, land in any area in the State declared in accordance with the provision of section 11 to be a village or, by virtue of section 422, deemed to be a village duly constituted as such under those provisions; and

(c) Country land, that is to say, all land above the shoreline other than town land or village land.

[24] Pursuant to s 51(2) of the Act 56 land above the shoreline are classified into three categories, town land, village land and country land.

[25] The category of land use is also not stated in the land title (annexure 'B' of document marked as 'E'). In order to determine the category of land use reference will have to be made to the provisions of s 53 of the Act 56 which states as follows:

> Conditions affecting use of lands alienated before commencement until category of land use imposed
>
> 53
>
> (1) This section applies to all land alienated before the commencement of this Act other than land which, immediately before the commencement, is subject to an express condition requiring its use for a particular purpose.
>
> (2) All land to which this section applies which is at the commencement of this Act —
>
> (a) country land;or
>
> (b) town or village land held under Land Office title,
>
> shall become subject at the commencement to an implied condition that it shall be used for agricultural purposes only:

[26] Section 53(1) of the Act 56 is applicable to all land alienated before the commencement of Act 56 which was 1 January 1966. The particulars obtained from Annexure 'B' of Document 'E' disclosed that the said land was alienated on 12 October 1959, which was a date before the commencement of Act 56. Pursuant to s 53(2) of the Act 56 the said land being a country land shall become subject at the commencement of Act 56 to an implied condition that it shall be used for agricultural purposes only.

[27] In determining the adequate compensation to be awarded to the applicant the government valuer had not valued the land as agricultural land but had instead taken into consideration the planning information she had obtained from the Department of Town Planning of the Kuala Lumpur City

Hall (annexure 'F' of document 'E') which stated that the said land is subject to residential zone with the density of 60 person per acre (also see para 10.0 of document 'E').

[28] Learned counsel for the applicant had submitted that since the said land is located in the town of Kuala Lumpur the said land is therefore town land and shall become subject to implied condition that it shall be used for building. It was further submitted that the case in hand fell squarely within the principle enunciated in the case of *Garden City Development Bhd v Collector of Land Revenue, Federal Territory* [1982] 2 MLJ 98; [1982] CLJ (Rep) 20. The facts in *Garden City* had to be distinguished from the case in hand as the land in that case is town land held under registry title whereas the case in hand relates to country land.

[29] In view of the above interpretation of ss 51 and 53(2) of the Act 56, the applicant's argument that the said land is a town land due its location in Kuala Lumpur has no merits and ought to be rejected by this court.

[30] I am satisfied that in assessing a fair and reasonable compensation to be awarded to the applicant the government valuer had taken all relevant factors into consideration and had not erred in law or facts as alleged by the applicant.

[31] In view of the above I am satisfied that the award of compensation of RM660 per sq meters in respect of 59037sq meters by the respondent that was confirmed by the panel was reasonable and within the principle and framework of the law.

Application allowed.

Reported by Kanesh Sundrum